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No. 90-1469

In The

Supreme Court of the United States

October Term, 1990

WILLIAM H. HERNSTADT AND JUDITH HERNSTADT,

Petitioners,

vs.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED[1]

Does federal procedural due process in a declaratory decree action prohibit a state trial court, after reversal of a judgment on appeal in favor of the Plaintiffs (Petitioners) with directions to enter judgment for the Defendant (Respondent), from entering a judgment on remand which declares the rights of the parties in favor of the Defendant (Respondent), without another evidentiary hearing when the issue had been the subject of a lengthy bench trial?

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[1] The Respondent restates the Question Presented because the Petitioner's statement of the question incorporates an inaccurate representation of the facts.

THE PARTIES

The Petitioners are William H. Hernstadt and Judith Hernstadt, who owned a condominium unit at Brickell Bay Club Condominium. Respondent is Brickell Bay Club Condominium Association, Inc. which is the condominium association that owns and operates the common elements of Brickell Bay Club Condominium in Dade County, Florida.

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[2] The Petitioners, William H. Hernstadt and Judith Hernstadt, the Plaintiffs below, will be referred to as Petitioners, and the Respondent, Brickell Bay Club Condominium Association, Inc., the Defendant below, will be referred to as the Respondent in this brief. The following symbols will be used:

"P" for Petition for Writ of Certiorari

"PA" for Petitioners' Appendix

"PSA" for Petitioners' Supplemental Appendix

"RA" for Respondent's Appendix

All emphasis is that of the Respondent unless otherwise indicated.

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COURT'S LACK OF JURISDICTION

Petitioners erroneously seek to invoke the jurisdiction of this Court under 28 U.S.C. Section 1254(1). The Judgment on which review is sought is not that of any United States Court of Appeals, but is rather a judgment which was affirmed by a Florida District Court of Appeal and which the Supreme Court of Florida refused to review under its discretionary jurisdiction. Therefore, if this Court's jurisdiction is invoked, it must be under 28 U.S.C. Section 1257(a).

Even under Section 28 U.S.C. Section 1257(a) the petition should be denied because it disregards and violates Rule 14(h), Supreme Court Rules. Rule 14(h) applies where review of a judgment of a state court is sought and specifically requires:

> (h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Petitioners have failed to provide this required information in their jurisdictional brief.

Although Petitioners had ample opportunity in the trial court, for example, at oral argument, in their memorandum of law and in their petition for rehearing, they failed to timely and properly raise or preserve the federal issue of deprivation of due process of law under the 14th Amendment to the United States Constitution in the trial court. Thus, the petition is entirely defective both as to substance and form insofar as Petitioners' failure to comply with Rule 14(h). *Webb v. Webb*, 451 U.S. 493, 68 L.Ed. 2d 392 (1981). As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 47 L.Ed.2d 668 (1976).

This Court also lacks jurisdiction because it does not appear on the face of the record that the highest state court ruled on a federal issue.[3] Petitioners raised the due process issue for the first time before the state appellate court and did so under both the Florida and United States Constitutions. Although the face of the opinion on which review is sought mentions "due process" (PSA 21), it cannot be determined whether the state court ruled under

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[3] Petitioners omitted from their original appendix the inextricably bound predecessor opinion involving the same parties and subject matter, *"Hernstadt I,"* 512 So.2d 994 (Fla. 3d DCA 1987) (PSA 1). Likewise the Petitioners failed to include in their initial appendix the opinion which they seek to have reviewed, to wit: *Hernstadt v. Brickell Bay Club Condominium Association*, 560 So.2d 1227 (Fla. 3d DCA 1990) hereinafter *Hernstadt II*, (PSA 16). These omissions, belatedly corrected upon demand of the Clerk of this Court by the filing of Petitioners' Supplemental Appendix, are telling because Petitioners have grossly misrepresented the facts and nature of the opinion they seek to have this Court review.

the federal or state constitutional provisions. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527 (1983); *Webb v. Webb, supra*. It is respectfully submitted that the Petition should be denied since the Petitioners have totally failed to properly raise or even demonstrate a federal issue upon which this Court can exercise its discretionary jurisdiction under 28 U.S.C. Section 1257(a).

STATEMENT OF THE CASE AND FACTS

The very first sentence in *Hernstadt I*, 512 So.2d 994 (Fla. 3d DCA 1987) summarizes the essence of the controversy between the parties, which was tried extensively in a lengthy bench trial, as (PSA 2):

> . . . a dispute over ownership of a roof structure in a condominium building.

In the first appeal, *Hernstadt I*, the Florida District Court of Appeals reversed the trial judge's decision in favor of the Hernstadts and found the disputed roof structure to be part of the condominium common elements – not owned by the Hernstadts (PSA 10):

> The Declaration of Condominium in this case required written approval by the Association for an alteration to the common elements. The Hernstadts were aware of the requirement before they started renovating the roof structure.

The court then remanded the cause for entry of judgment on its mandate. Thereafter the trial court entered its judgment on the mandate and the Petitioner again appealed contesting the order implementing the mandate from the decision in *Hernstadt I*.

In the opinion on which review is sought, *Hernstadt II* 560 So.2d 1227 (Fla.3d DCA 1990), the Florida District Court of Appeals affirmed the final judgment entered upon its remand in *Hernstadt I*, finding that the trial court had correctly interpreted its first opinion. The trial court simply declared the rights of the respective parties as to the roof structure and enforced those rights by requiring, *inter alia*, the Petitioners to vacate the roof structure. The Petitioners now speciously complain because the declaration of rights they sought in their complaint was ultimately declared adverse to them.

ARGUMENT FOR DENYING THE WRIT

As noted in *Hernstadt II*, the Petitioners are the parties who filed suit for declaratory decree concerning their rights to the roof structure and Respondent counterclaimed (PSA 18):

> The Hernstadts initiated a lawsuit which requested declaratory judgment and other relief. The Association counterclaimed for a mandatory injunction requiring the Hernstadts to cease and desist from using the roof structure, damages and other relief.

The mere fact that the opinion in *Hernstadt I*, which was incorporated in the final judgment on the mandate entered by the trial court on remand, was adverse to the Petitioners, does not mean they were denied due process of law. Florida Statute Section 86.011 provides, inter alia:

> The court may render declaratory judgments on the *existence or non-existence* . . . of any right . . .

The Petitioners' Complaint below requested the trial court *"declare the rights of the parties with respect to the structure, and award relief sufficient to enforce said rights"* (RA 1). On remand the trial court entered a judgment on the mandate of *Hernstadt I* declaring rights and awarding relief in favor of Respondent. As stated by the Supreme Court of Florida in *May v. Holley*, 59 So.2d 636 (Fla. 1952):

> The fact that the declaration must be against the interest of the complaining party, and equity may require that costs be charged against him does not destroy the right to the declaration. If the standards stated above are met the plaintiff is entitled to have the existence or nonexistence of his rights adjudicated. 59 So.2d at 639.

In *Talcott, Jr. v. Central Bank*, 220 So.2d 411 (Fla. 3d DCA 1969) the Third District Court of Appeal noted:

> The possibility [or even probability] that the proper interpretation of the agreement in question would result in an adverse decree to the plaintiffs does not preclude their right to a declaratory decree. 220 So.2d at 413.

Also see *Gates v. Jacksonville*, 278 So.2d 645 (Fla. 1st DCA 1973).

Contrary to what actually occurred, Petitioners portray this declaration of rights and enforcement thereof as if it were the granting of some unrelated counterclaim without notice or hearing. Although the final judgment on the mandate (PA 1) is phrased as the granting of relief sought by Respondent in its counterclaim (i.e., requiring Petitioners to vacate the roof structure), this cannot reasonably be characterized as: " . . . a judgment on Respondent's non-adjudicated, non-briefed, non-argued, non-decided counterclaim . . . " (P 9). As noted by the

Supreme Court of Florida in *Smith v. Smith*, 118 So.2d 204 at 205 (Fla. 1960):

> When a final decree . . . is reversed without specific directions to enter a particular decree or order, the effect of the reversal is to remand the cause to the lower court for the entry of a further decree consistent with the ruling of this Court.

All that occurred in *Hernstadt II*, which is the case *sub judice*, is a ruling that on remand the trial court entered a final judgment that was consistent with the appellate court's own prior ruling in *Hernstadt I*. In fact the same appellate court on the second appeal acknowledged that the trial court had indeed entered a judgment which was consistent with its prior mandate.

There is not the slightest connection between the cases cited by Petitioner and the facts of the present case. Petitioners' first two cases are what they characterize as " . . . a line of NLRB switched theory cases" (P 11). *NLRB v. Pepsi-Cola Bottling Co. of Topeka, Inc.*, 613 F.2d 267 (10th Cir. 1980); *Facet Ent. v. NLRB*, 907 F.2d 963 (10th Cir. 1990). The opinion on which review is sought, *Hernstadt II*, does not involve any "switched theory" but is merely a determination by the Florida District Court of Appeal that the final judgment entered upon remand from *Hernstadt I*, correctly interpreted its initial opinion and mandate by setting forth the rights of the respective parties as to the roof structure.

Petitioners also cite the following two cases involving one form or another of "switched theory." In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), there was a retroactive application of a criminal statute and in *Cole v. Arkansas*,

333 U.S. 196 (1948) conviction of a defendant under a criminal statute different than the one under which the defendant was charged. Both of these cases are so far afield from the facts of the opinion on which review is sought herein that discussion of the obvious differences is not warranted.

Finally, Petitioners cite the case of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) in their footnote 2. In *Zauderer*, this Court rejected a disciplined lawyer's argument that "the theory relied on by the [disciplinary board and then the Ohio Supreme Court] as to how the advertisement was deceptive was different from the theory asserted by the Office of Disciplinary Counsel in its complaint." 471 U.S. at 654. In *Zauderer*, this Court held: " . . . the Board's recommendations put [Zauderer] on notice of the charges he had to answer . . . " 471 U.S. 654. In the instant case, not only were Petitioners fully on notice of the relief sought by Respondent, Petitioners themselves asked for that very relief, to wit: a declaration of rights as to the disputed roof structure and enforcement thereof (PSA 18 and RA 1). Petitioner's complaint sought a declaratory decree (RA 1). Petitioners got exactly what they sought – a declaratory decree – but it was adverse to them. Petitioners now take the preposterous position that an appellate court cannot implement its previous mandate and by doing so it deprived them of due process under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The Petition for a Writ of Certiorari should be denied as frivolous and Respondent moves for the assessment against Petitioners of attorneys' fees and/or such other sanctions as the court deems appropriate.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 82-7186 (CA 25)

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife,

Plaintiffs,

vs.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION,

Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs, WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife, through undersigned counsel, sue Defendant, BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., a Florida Not-for-Profit Corporation, and state:

* * *

COUNT II

22. This is an action for equitable relief, declaratory judgment and damages.

* * *

30. Defendants have caused doubt as to Plaintiff's rights in connection with the said structure, and Plaintiffs hereby seek a declaration of their rights from this Court.

WHEREFORE, Plaintiffs pray that this Court award the following relief:

(a) Declare that the structure shall continue to be a part of Terrace Suite A as divided, and to remain over the larger unit therefor for the exclusive use of the owners thereof;

(b) Alternatively, declare that the structure is an appurtenance to Terrace Suite A in accordance with Florida Statute §718.109;

(c) Alternatively, declare that the Plaintiffs have the right to an exclusive easement in the structure;

(d) Alternatively, declare that the superstructure is a limited common element with its rights to exclusive use belonging to the Plaintiff;

(e) Further declare the rights of the parties with respect to the structure, and award relief sufficient to enforce said rights;

(f) Award a reasonable attorney's fee pursuant to §57.105 Florida Statutes;

(g) Award damages, interest, costs and such other and further relief as this Court deems just and proper.